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debates apparently assumed otherwise. The question therefore is an open one—it is purely and simply a question of treaty interpretation, and, unless the provisions of the Canal Act which have given rise to the dispute are modified or repealed, the obligation of the United States to accept the proposal of the British Government to submit the controversy to arbitration is one which the Government of the United States cannot honorably refuse.

The CHAIRMAN. Before proceeding with the discussion of this paper and the last paper of last evening, we will proceed with the program of the morning. All of the speakers are present, and, therefore, it would seem that we should go immediately forward.

The first paper on the program for this morning is on the question “Is it necessary in international law that injury actually be suffered before a justiciable action arises?”, which is to be read by Mr. Thomas Raeburn White, of the Philadelphia Bar.

IS IT NECESSARY IN INTERNATIONAL LAW THAT INJURY ACTUALLY BE SUFFERED BEFORE A JUSTICIABLE ACTION ARISES?

ADDRESS OF MR. THOMAS RAEBURN WHITE, *of the Philadelphia Bar.*

The expression “justiciable action” carries with it the idea of compulsion. An action is a proceeding in a court of justice. It implies that the plaintiff can compel the defendant to answer and obey the order of the court.

An action, however, in this sense can scarcely be said to exist in international law; there is no recognized court; there is no method of commencing an action by summoning the defendant; there can be no compulsion to answer. By “action” in international law, therefore, we mean something slightly different—the right of one nation to demand of another that a dispute be submitted to arbitration. The word “justiciable” presupposes a controversy capable of being, and proper to be, so submitted.

But how can one nation be said ever to have the right to *demand* that a controversy be submitted to arbitration? Clearly no demand can be enforced. But an action or right of action may be said to arise where the circumstances are such that the demand for arbitration would be supported by the united opinion of the civilized world, and

a refusal would meet with universal disapproval; in a sense the submission to arbitration in such case is obligatory.

The problem before us is to determine the limits, if that be possible, of the cases in which such demand would be supported by international public opinion, and whether it is an essential incident of such cases that injury shall have been suffered before the demand is made. There are some classes of cases in which a demand for arbitration would be generally recognized to be reasonable, and a refusal would be deemed unreasonable and as showing a disinclination to observe the rules which generally govern the action of states toward one another.

First, whenever a state has violated the standard of conduct generally accepted as regulating the relations of nations (the *modus vivendi*, as it has been called), and in so doing has inflicted injury upon another, the right of the injured party to demand reparation, and to have the amount thereof ascertained by a court of arbitration, is, I think, generally conceded. In such case the injury necessarily precedes the demand for arbitration.

The second class of cases is where there is a difference as to the interpretation or application of a treaty; but not in all such cases would a demand for arbitration be necessarily approved by universal opinion. In some instances the treaties so clearly relate to political questions affecting the sovereignty of nations that the questions at issue would be generally recognized as unsuitable for arbitration. But there are many cases of disputes over the interpretation or application of treaties which are generally conceded to be justiciable. For example, questions of a technical nature, not involving political considerations; treaties concerning such matters as extradition, copyright, the establishment of extraterritorial courts, the control and navigation of international waterways and, in general, boundary questions arising from treaty obscurities.

A third class of cases where a justiciable action may exist is where the two nations have by treaty agreed to submit to arbitration a class of disputes including the one in question.

But there are certain general principles which, in the present stage of development of international law, affect the decision in all the preceding cases. It may be said in general that a nation cannot be compelled by the force of public opinion to submit a dispute to arbitration, if its honor, its vital interests, or its independence are involved

Moreover, it is conceded that ordinarily a political, as distinguished from a legal, question cannot be arbitrated, or at least a demand for arbitration may be refused.

A legal question is one where the rule or law applicable to the case is known in advance, and the only duty of the tribunal is to ascertain the facts and apply the law; if the law is uncertain or if honor, vital interests or independence are involved, the question is deemed to be political. In such case, as the matter now stands, no justiciable action can be said to arise.

But I apprehend, in view of the general subject of this meeting, it was expected there would be a more particular discussion of the question now pending over the Panama Canal Act, and whether a case for arbitration has as yet arisen in that instance.

First, is this a case for arbitration at all, postponing for the moment the question as to the infliction of injury? On this point there can be little doubt. By the Hay-Pauncefote Treaty certain definite rules were laid down which were to govern the control and regulation of the Panama Canal and the charges of traffic. The United States has by an act of legislature declared its interpretation of that treaty, and has placed in the hands of the Executive the power to do certain acts which it is claimed will unfavorably affect British shipping. The interpretation placed on the treaty by the Act of Congress is claimed by Great Britain to be erroneous. Even without reference to the treaty agreeing to arbitrate such disputes as this, it is clear that a question is presented purely technical in its nature, *i. e.*, do the Canal Act and the treaty conflict, and, if so, in what particulars? No new rule is to be laid down, no political question is involved; the matter is exclusively one of interpretation by the application of well-known rules of construction.

If it be contended that a political question is involved, because the result may be to restrict the United States in its control of its own territory, the answer is no such question will be involved in the arbitration. The treaty when properly interpreted will be the restraining power and must be obeyed of its own force, unless the United States then takes the position that she will not be bound by it. Until then no political question would exist. It is beyond the scope of this paper, and somewhat aside from its main purpose, to enter into the question whether, notwithstanding the above observations, the United States would be justified in refusing arbitration on the ground that

the question is one of domestic policy, or that vital interests are involved; or whether, even if in an ordinary case such refusal would be supported by world opinion, the United States, in view of its obligatory arbitration treaty and of its often expressed adherence to the doctrine of obligatory arbitration, could afford to assume such an attitude. I desire, however, to record my entire dissent from any such contention.

It is interesting to note in this connection, however, that in one of the very few instances where any effort has been made to point out what treaties are susceptible of arbitral interpretation, treaties concerning oceanic canals were expressly included. In the explanatory note annexed to the Russian Proposal of International Arbitration, submitted to the Peace Conference of 1899, it is said:

Among the treaties for the interpretation of which compulsory arbitration ought to be admitted fully and unconditionally we may cite first of all the extensive group of those having universal character, and which have constituted a system of international means for subserving interests which are likewise international. * * *

At present all treaties coming within the following two subdivisions may be included within the category of treaties of a universal character which are susceptible of admitting compulsory arbitration:

1. Treaties concluded for the purpose of affording international protection to the great arteries of international communication, postal, telegraph, and railroad conventions, conventions for the protection of submarine cables, regulations for the purpose of preventing collisions of vessels on the high seas and conventions relating to navigation on international rivers and interoceanic canals.

Moreover, there is authority in international law for the proposition that canals, such as the Panama Canal and the Suez Canal, are to be considered as existing for the common benefit of mankind, and that one nation could not legally exclude other nations from the use thereof, even if it were the absolute owner of the territory through which the canal passes. In short, the proposition has been advanced by very high authority, and I believe it to be sustained by reason, and by the general acquiescence in the principles which have governed the management of the Suez Canal, that the nation enjoying the ownership of an interoceanic canal cannot lawfully discriminate in

favor even of itself as against others. The general rules for the conduct of the Suez Canal have been adopted for the Panama Canal, and while the only nations which are parties to the treaty adopting these rules are the United States and Great Britain, it is not to be overlooked that they are the two great nations which dominate the Western Hemisphere, and that the other nations doubtless assumed that their interests were sufficiently safeguarded by the guarantee that all nations would be treated equally. In short, it seems a reasonable proposition, as suggested by Professor Westlake, that the system adopted for the control of the Suez and Panama Canals "must be considered as the *modus vivendi* established for a class of cases, though a restricted one," and, therefore, any violation of that *modus vivendi* even by the nation which owns the canal necessarily gives rise to a justiciable action, irrespective of a treaty and irrespective of any political questions which might be alleged to be involved.

But it is said no injury has as yet been inflicted, and, therefore, no case for arbitration has yet arisen, and this is the question for discussion especially assigned to this paper.

First considering the question somewhat generally: What bearing upon the case has the fact that no injury has as yet been inflicted? Is there any fundamental reason why a justiciable action does not arise until after actual injury? Even in municipal law there are cases where an action may be begun before any injury has been suffered. An action for damages for the anticipatory breach of a contract, a bill to quiet the title to land, or to restrain the issuance of municipal bonds—are instances in which actions are recognized and enforced by municipal law, although no injury has as yet been suffered by the plaintiff. I know of no case in which there has been a breach of commonly accepted rules of conduct by one nation against another, involving only a legal and not a political question, in which there has been a demand for arbitration prior to the infliction of actual injury. But I conceive that there may be such cases, and there does not seem to be any adequate reason why the actual infliction of injury is an inseparable incident to the existence of such a claim.

But the suggestion may be made that, especially in cases involving the interpretation of treaties, the fact that no actual injury has been inflicted renders the question political; that in such case the demand for arbitration will be in an effort to restrain the action of a sovereign power, and, therefore, the question is political and no justiciable

action can arise. It may be conceded that in the present condition of international law such a question would be in measure at least political. If injury has actually been suffered, the offending nation could not meet the demand for redress by abrogating the treaty *nunc pro tunc*. But if no injury has been inflicted the whole question is still open—assuming the interpretation to be inimical to its interests, perhaps the defendant nation will claim the right to abrogate the treaty, and, therefore, a political question will be presented. But does it necessarily follow that the question is not justiciable? If all other elements of a justiciable action are present, does the fact that there is as yet no actual injury, and that the question is in a sense political, prevent an arbitral case from arising? No reason is perceived why it should, and, in answering this question, the reason for the growing recognition of cases for obligatory arbitration should be considered.

The opinion of organized society is rapidly reaching the point where it recognizes not only the wickedness, but the inadequacy, of war as a means of settling international disputes, and it is ready to accept such principles of international law to govern international conduct as will avoid that method of settling disputes in future. There can be no question that a rule which provides that a justiciable action does not arise until after the infliction of injury would not tend toward the prevention of war, but rather the contrary. The fact that the recognition of the right to demand the submission to arbitration of such a controversy, prior to the infliction of injury, would tend to avoid international conflict should have a controlling effect upon the settlement of this question.

In considering this matter reference should be made to the Final Acts of the Hague Conferences of 1899 and 1907. In Article 17 of the Convention for the Pacific Settlement of International Disputes, at the First Conference, which was repeated without change as the 39th Article of the same convention at the Second Conference, it is provided, referring to the submission of cases to the Permanent Court of Arbitration at The Hague:

The submission to arbitration is concluded for questions already existing or for questions which may arise eventually; it may embrace any dispute or only disputes of a certain category.

This language is very broad, and the announcement that *any* dispute may be submitted to arbitration is an indication of the opinion

of the world, expressed in the form of a convention, that political disputes are suitable for such submission even though it is not yet recognized that one nation has the right to demand of the other that they should be so submitted.

The treaty between Great Britain and the United States providing for the obligatory arbitration of certain controversies also admits, and thereby impliedly approves, the arbitration of some political questions. The language of the treaty is:

Differences which may arise of a legal nature or relating to the interpretation of treaties existing between the two contracting parties, and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague by the Convention of the 29th of July, 1899, provided, nevertheless, that they do not affect the vital interests, the independence, or the honor of the two contracting states, and do not concern the interests of third parties.

The opening words of this paragraph contemplate the arbitration of differences of a legal nature, *or* relating to the interpretation of treaties. The expression "relating to the interpretation of treaties" is unlimited and might include cases of a political nature.

It will be instructive to discuss the pending Panama controversy as illustrative of this matter. To the request of the British Government that the dispute as to the interpretation of the treaty should be submitted to arbitration, the United States Government, through Secretary Knox, replied taking the position, *inter alia*, that so far as the request for arbitration was concerned a case had not yet presented itself where the United States was bound to make any direct response thereto; that no injury had been suffered by Great Britain, and that whether any injury was suffered in future would depend upon future action of the Executive, which neither nation was bound to anticipate. The Secretary continued:

Concerning this possible future injury, it is only necessary to say that in the absence of an allegation of actual or certainly impending injury there appears nothing upon which to base a sound complaint.

Although a little aside from the point now under discussion, it is proper to point out that it is not clear that no injury has as yet been

inflicted. The announcement by a solemn act of legislation of the interpretation placed upon the Hay-Pauncefote Treaty by the United States is in effect a declaration that discrimination can legally be made in favor of United States vessels. Although no vessels have yet passed through the canal and no discriminative rates have actually been imposed with consequent effect upon commerce, it cannot be said that no injury has been inflicted by this declaration of the interpretation of the treaty. Doubtless preparations are now being made in some quarters for the carrying of commerce through the canal, and the industries engaged in preparing for such commerce, either in the building of ships or in the arranging of other matters preliminary thereto, may be and probably have been unfavorably affected. It is by no means clear, therefore, that no injury has been suffered.

But passing this point and assuming that no injury has been inflicted, it is clear that a case is presented of a technical nature, relative to the interpretation of a treaty. It is possible, but scarcely reasonable, for the United States to take the position that the question may yet be settled by diplomacy, for it has acted through Congress and announced in an authoritative way the interpretation upon which it proposes to insist. The only reason, therefore, which can be urged in refusing arbitration is that the question is political, because no actual injury has been inflicted.

This brings us, therefore, to the real question underlying the whole controversy: Is there any fundamental reason why two independent nations should not submit a political dispute to the decision of an arbitral tribunal? Although, as has been stated, there are many treaties which admit of political disputes being submitted, it cannot be said that international law has as yet reached the point where the arbitral character of such disputes is generally recognized. But there is no reason why they should not be, provided at least they do not affect the honor, vital interests or the independence of nations, as the pending controversy clearly does not. Probably one reason why nations are disinclined to admit that political disputes can be settled by arbitration is because of the feeling that for a nation to be controlled in its future action is an impairment of its sovereignty, whereas a mere adjudication as to the amount which it owes for injury inflicted is not such impairment, being only a convenient method of ascertaining the amount of damage which the nation is willing to pay.

However, the fact that international law now recognizes, at least

tacitly, that there are cases where arbitration is in a sense obligatory is an admission that, even in cases of a legal nature, the element of compulsion does exist, although enforced only by public opinion. If the element of compulsion exists where there is a demand for injury inflicted, why should it not exist where there is a demand that threatened injury be restrained? There is no fundamental distinction between the two cases.

Municipal law develops by the advance of public opinion, which ultimately establishes rules of action, either through acts of legislation or through precedents made by the courts in decided cases. International law develops in the same way. International public opinion has, I think it may be said, already contemplated the decision of some political questions by arbitral tribunals, as indicated by the general language of treaties admitting of the decision of such disputes in that way. The Hague Conferences, through the conventions already referred to, analogous to acts of legislatures in states, have announced that arbitration is suitable for the decision of "*any dispute*", which includes *political* disputes. The next step would naturally be a precedent, which as yet does not exist. The occasion for such precedent has arisen. By making the request which it has done, Great Britain has in effect announced its adherence to the principle that a question concerning the interpretation of a treaty, political in the sense that no injury has been inflicted, can and should be submitted to arbitration in advance of such injury. This is of little value as a precedent, because it is to the interest of Great Britain that this position be assumed, but with the United States it is quite different. If it accedes to the demand of Great Britain, where its action will be contrary to its own interests, and agrees that a case for arbitration has arisen in a matter involving a political question, a precedent will be established of the utmost value, which will mark a distinct step in advance in the development of international law, and which will go far toward establishing the rule that the settlement of international controversies should, wherever possible, precede rather than follow the doing of acts likely to cause international friction. If such a principle becomes finally established it will undoubtedly promote the cause of international peace and good will.

In view of the long and honorable history of the United States as a leader in the movement for the substitution of a system of international judicature for the present unsatisfactory methods of set-

ting international disputes, it is particularly appropriate, that the opportunity should have been offered it to establish such a precedent. It should go further than any other nation in yielding to any well-founded request that a dispute should be arbitrated. It would be unworthy of the United States to rely upon what must be deemed a technical reason for declining to arbitrate, and it is to be hoped that the State Department will not persist in the attitude which has been assumed, and will embrace the opportunity of creating a precedent sustaining the proposition that it is not necessary in international law that injury actually be suffered before a justiciable action arises.

The CHAIRMAN. Professor Westlake, who died on the 17th of April, and who was the mentor of the British Government in many of these affairs, sent, before he died, to the Secretary a letter upon this particular matter, which I will ask the Secretary to read:

Secretary SCOTT. Before reading the letter I should like to say that I asked this year a number of foreign publicists to be present and participate in the discussion, among others, naturally, Professor Westlake. In a personal letter, he regretted that his advanced age and precarious state of health would not permit him to come, but he took a great interest in the program, which was enclosed in the letter that I sent to him, especially in Question 7, and promised a brief memorandum. A few days after his letter of declination, I received the memorandum, which I now have the honor to read.

Under date of March 14, 1913, the distinguished publicist said:

Dear Professor Scott:

I now sit down to send you those observations on the "proposed subjects for discussion" at the forthcoming meeting of the American Society of International Law, which I promised you in my last.

The whole series of those subjects is full of the canal, which indeed has now an overmastering interest for all who are concerned about the rectitude of international conduct and the promotion of international arbitration. The most admirable speech of Mr. Elihu Root in the Senate, which he was so kind as to send me, enables me to feel assured that under his guidance the discussions in the Association will be thorough and sound. It is therefore only as to No. 7 in the list, which steps a little out from the line of the others, that I wish to say a few words.